INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional and Statutory provisions Involved	2
Statement	3
Summary of Argument	12
Argument	15
Conclusion	38

CITATIONS

Cases:

Boom Co. v. Patterson, 98 U.S. 403 . 20
Brooks-Scanlon Corp. v. United States, 265 U.S. 106 . . . . . 15, 21
Burkhart v. United States, 227 F.2d 659, 9th Cir. 34
Cal-Bay Corporation v. United States, 169 F.2d 15, 9th Cir. . . . 30
Chung v. Fong Co., 130 Wash. 154 . . 5
Emery v. Boston Terminal Co., 59 N.E. 763 32
McCandess v. United States, 298 U.S. 342 18
Nicholson v. Weaver, 194 F.2d 804, 9th Cir. 34
Olson v. United States, 292 U.S. 246 . . 15, 18, 21, 29, 31, 35
Osborne v. United States, 145 F.2d 892, 9th Cir. 25, 33
Phillips v. United States, 243 F.2d 1, 9th Cir. 19, 30, 31
United States v. Adamant, 197 F.2d 1, 9th Cir. 34
United States v. Benning 330 F.2d 527, 6th Cir. 18, 20

Page

United States v. Block
160 F.2d 604, 9th Cir. 34
United States v. Certain property,
Borough of Manhatten,
388 F. 2d 596, 2nd Cir. 10, 26
United States v. Cox, 10th Cir. . . 25
United States v. Fuller,
442 F.2d 504, 9th Cir. 11, 24
United States v. Jaramillo,
190 F.2d 300, 10th Cir. 11, 24
United States v. Miller,
317 U.S. 369 . . . . . .15, 20, 31, 35
United States v. Petty Motor
Company, 327 U.S. 372 . . . . . .15, 31
United States v. Scully,
409 F.2d 1061, 10th Cir. 33, 34
United States v. Seagren,
50 F.2d 333, Wash. D.C. Cir.. . 5, 14, 27
United States v. 1,132.5 acres of
land, etc., Upper Allegheny Sand
& Gravel Co., 411 F.2d 356,
2nd Cir. 13, 25
United States v. 10,291.83 acres
of land, etc., 411 F.2d 1081,
6th Cir. 18, 20

Constitution:
Fifth Amendment 2

Statutes:
84 Stat. 1821, 33 U.S.C.A. 595a . 2, 15

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971
No. 71-951

ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, a Washington Corporation,

Petitioner,

v.

UNITED STATES OF AMERICA
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

OPINIONS BELOW

There is no written memorandum or reported opinion of the District Court. Its oral remarks in ruling on a preliminary motion to determine the law of the case appear in Appendix A, page 47, of the petition. The oral statements made in rendering judgment appear at page 51 of the same Appendix. The Circuit Court opinion is reported in 450 F. 2d 125 (App. A, p. 32 of the petition).

JURISDICTION

The Circuit Court judgment was made and entered September 23, 1971, and its order denying a rehearing was entered on December 9, 1971, (App. A, p.46, of the petition). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and that of the District Court under Title 28 U.S. Code 1358.

QUESTION PRESENTED

In awarding just compensation to a tenant in the condemnation of a leasehold interest in real property, including tenant owned building improvements and fixtures situated thereon, may an element of great inherent value in the improvements be excluded merely because it does not, by itself, rise to the status of a legal property right.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states: "nor shall private property be taken for public use, without just compensation."

84 Stat. 1821, 33 U.S.C.A. 595a, provides:

"In all cases where real property

shall be taken by the United States . . . in connection with any improvement of rivers, . . . the compensation to be paid for real property taken . . . shall be the fair market value of such real property based upon all uses to which such real property may reasonably be put, including its highest and best use, . . . The compensation defined herein shall apply . . . to the determination of just compensation in any condemnation suit pending on December 31, 1970."

STATEMENT

On May 26, 1967, the United States filed an action and a declaration of taking in the United States District Court for the Eastern District of Washington, Northern Division, to condemn the leasehold of the Almota Farmers Elevator and Warehouse Company, in 0.75 acre of land owned in fee by the Oregon-Washington Railroad and Navigation Company and situated in a relatively remote area at Almota in Whitman County in Eastern Washington for the Little Goose Lock and Dam, a river improvement and navigation project on the Snake River.

The Almota Company had been a tenant of the property under various consecutive railroad leases since 1919. The one taken being a 20 year lease expiring October 12,

1974, which contained no renewal option. The land as leased was totally unimproved and of no great value, the rent being $114.20 per year. The tenant erected building improvements and installed machinery and equipment all of which was owned by the Almota Company with a right of removal. That ownership was not limited to the term of the lease. Treated as real estate it amounted to a fee interest in the improvements. The buildings taken included three crib grain elevator buildings and a concrete tank of a total grain storage capacity of 522,500 bushels plus a grain warehouse of 63,900 bushels capacity.

No factual dispute exists. The sole issue is one of law as to what inherent elements of value must be considered in arriving at the amount of just compensation under the Fifth Amendment and of fair market value based upon all uses to which the condemned property may reasonably be put. The value of the leasehold, exclusive of the improvements, etc., was urged by the Government to be the use value of the unimproved premises to the end of the term less the agreed rent of $114.20 per year. That was con-

ceded and is not in issue. But the Government further contended that the same rule should be applied to the valuation of the tenant owned improvements and fixtures plus only their salvage value remaining at the end of the term of the lease, in spite of the admitted facts of the right of removal and that, as between the landlord and the tenant, they were the personal property of the Almota Company[1] which ownership was in effect a "fee" that would not end with the lease.

The Government further argued that no consideration whatsoever should be given in the valuation of Almota's improvements to any element of value arising from the possibility or probability of a renewal of the lease (enabling their use to continue in place) or to the enhanced value of the premises as a whole arising from the tenant owned leasehold improvements. It thereby sought to acquire the lessee's improvements, etc. (held as personal pro-

(1) By the law of the State of Washington (Chung v. Fong Co., 130 Wash. 154) tenant owned building improvements are the personal property of the tenant as between landlord and tenant though for purposes of what the Government must condemn they are part of the real estate. (United States v. Seagren, 50 F. 2d 333)

perty but for purposes of condemnation being a part of the real estate) at far less than their actual fair market value[1] although Almota owned a fee in the improvements when considered as real estate.

Almota argued that it should receive for its improvements exactly what they could have sold for in a fair market sale considering all elements of value whatsoever inhering in them, including such probability or lack of probability as existed of their continued use in place arising from a renewal of the lease, and further that, since the fee was not owned by the Government and as there was agreed evidence tending to show a great probability of renewal, the improvements should not be valued on the assumption that it was inevitable that they must be removed at the end of the term.[2]

(1) The Government agreed by stipulation that the leasehold and tenant owned improvements, etc., considering all elements of value would in fact sell upon the market at the time of taking for $274,625 whereas under the valuation theory of the Government the value would be limited to $130,000 by excluding all consideration of the probable use of the improvements in place. (App. 29-30).
(2) The parties by stipulation agreed that there was evidence of a great probability of a lease renewal. (App. 25).

Initially the valuation question was raised by the lessee's motion "for determination of the law of the case on valuation of building improvements" (App. 4). The oral statement of the Trial Court in granting the motion is set forth in Appendix A of the petition at page 47. The Court held:

> "So, I will hold the appraisers in this case are entitled and should be required to value the property as it existed at the time of taking, and the interests of the Almota Company must be valued at what it could be sold for on the open market, taking everything into consideration including the possibility of renewal value of the property in place, and the prospects, if they find prospects, of having the landlord require that the buildings be removed from the property. All of these elements as they find them affecting the Almota Company and the property as of the date of taking."

Thereafter the Trial Court adhered to its position and on April 1, 1969, entered judgment in favor of the Almota Company for $274,625. The oral remarks of the Court in granting judgment are set forth at page 51 of Appendix A of the petition.

The fee owner of the premises was never a party to the action. It was urged by Almota, concurred in by the Trial Court,

and admitted by counsel for the Government in a Trial Court argument[1] that under the unit rule of valuation with the fee owner joined as a defendant the award for the improvements would have necessarily been very substantially greater than the

(1) In argument upon the preliminary motion the following remarks were made between Government counsel and the Court:
Mr. McRae: "....So, your honor, I don't think it defies legal principles to say that it follows that what they are entitled to is the value of their lease, the value of their tenancy, as enhanced by the buildings which they put on the property, which are real property, and here they have the right to remove the buildings, so they are entitled to whatever removal value they had.
The Court: Mr. McRae, on your theory of the case, on the day before the condemnation action was filed, if the Almota Company had conveyed this property to the railroad company, you would be paying them about five times as much as you are offering them now -- you would be paying the railroad company about five times as much as you are offering them now.
Mr. McRae: On the day before?
The Court: If, on the day before, the landlord and the tenant's interests were merged, before you acquired -- or suppose you acquired -- suppose the railroad company conveyed this [0.75] acres to the Almota Company on the day before the condemnation action, they would have owned this fee and the buildings and the lease, and you would then be paying substantially a greater amount of money, wouldn't you?
Mr. McRae: Yes, your Honor."

$130,000 valuation contended for by the Government[1].

No testimony was taken. Judgment was entered on April 1, 1969, based upon a stipulation of the parties (App. 22) and the agreed facts in the pre-trial order (App. 9) that the fair market value of the interests of Almota in the land and improvements valued as contended for by Almota was the sum of $274,625. It was also stipulated that the value based on the tenant's "bare legal rights", as contended by the Government, was the sum of $130,000. The term "bare legal rights" was used to refer to the contention of the Government that, as Almota had no legal right to a renewal of the lease, no enhanced market value of the improvements arising from any probability of a renewal could be considered.

The Government appealed to the Circuit Court of Appeals for the Ninth Circuit. That Court entered its decision on September 23, 1971, reversing the Trial Court and determining just compensation to be the

(1) In that connection Almota contended and the Trial Court concluded that the amount of just compensation awarded should not be reduced merely because the fee owner was not a party to the action.

sum of $130,000 pursuant to the method of valuation contended for by the Government. (App. A of the petition at p. 32).

The opinion erroneously concludes that the judgment of the Trial Court included compensation for a renewal expectancy of the lease as a compensable property right whereas it was only considered as an element of value inhering in and adding to the market value of the property taken. In its opinion the Circuit Court concedes that the case of Borough of Manhatten, 388 F. 2d 596, relied upon by the Trial Court, does support the position of Almota but it declined to follow that decision in the Ninth Circuit and proceeded to adopt a rule directly in conflict with it.

Although there is nothing in the record that the Government had acquired the fee title or settled with the fee owner prior to bringing the action, nevertheless, the Circuit Court erroneously found as a fact that the Government had settled with the fee owner prior to the suit. Conceivably from the erroneous finding the Court could have concluded that the Government did have a legal right at the time of the taking to refuse to renew the lease and

hence the improvements and fixtures must be valued only for their salvage or removal value at the end of the term whereas the Government, in fact, had no such legal right as it had not settled with the fee owner prior to the action.(1)

A petition for rehearing was timely filed in which it was urged that the possibility or probability of a renewal of the lease was an element of value inhering in the tenant owned improvements entitled to consideration the same as are such matters as schools, roads, markets, views, etc., as held by both the Ninth and Tenth Circuits in United States v. Fuller, 442 F. 2d 504, and United States v. Jaramillo, 190 F. 2d 300, all of which are generally elements of value considered without there being any legal right to their continued existence. The petition was denied on December 9, 1971.

(1) The pre-trial order states (App. 11): "The fee title to said lands immediately prior to the filing of the Declaration of Taking was in the Oregon-Washington Railroad and Navigation Company * * * ."

SUMMARY OF ARGUMENT

By statute (84 Stat.1821, quoted at page 2 herein), by the stipulation of the parties, and by the substantially unanimous holding of the cases the amount of just compensation to be awarded is the fair market value at the time of taking of the property taken. Although the parties stipulated to two greatly different values both were for the very same identical property, being the "interest of * * * Almota * * * in the land and improvements" taken. That interest is recognized to be a leasehold interest in the unimproved land to the end of the lease term plus the full "fee" ownership of the elevator facilities erected by Almota thereon, subject to removal at the end of the term in the event the lease is not renewed (App. 11-13).

The fair market value of Almota's interest "in the land and improvements" at the time of taking was fixed by stipulation at $274,625 (App. 29-30) considering all the elements and possibilities whatsoever found to then effect the market value of those interests including but not exclusive of the possibilities of renewal of the lease and of the landlord requiring the removal of the improvements in the event of there being no lease re-

newal" (App. 27).

The lesser value of $130,000 arrived at as urged by the Government is reached by eliminating from the determination of market value all consideration of any element of value arising from the probable renewal of the lease at the end of the term thereby eliminating from consideration the continued use of the improvements in place as a reasonably probable use to which the property could then be put. That contention is contrary to the well established rule of the Second Circuit Court of Appeals that tenant owned fixtures should be valued at their market value for use in place, Allegheny Sand and Gravel Case, 411 F.2d 356. The Washington, D.C. Circuit appears to have reached the same result in the Seagren case (50 F.2d 333) where concrete paving and building improvements were taken. The Government's position is also contrary to the unit rule cases, to the rule that all probable uses and elements of value must be considered, and to the rule that the owner must be placed in the same pecuniary position as to the time of the taking.

While the Government is not required to pay for interests in property which do

not constitute legal property rights, nevertheless, in their valuation all elements affecting fair market value must be considered even though they do not, alone and by themselves, rise to the status of compensable legal property. Many such elements of value are constantly so considered such as roads, schools, transportation facilities, views, surrounding neighborhoods, etc. Although Almota owned no legal right assuring a renewal of the lease and the continued use of the property in place neither did the Government own any legal right which would assure that the lease would not be renewed. The continued use of the property in place was one of the probable uses to which it could reasonably be put at the end of the lease term.

Almota should be placed in the same pecuniary position as before the taking when its property would sell for $274,625. That is far less than would have been awarded under the unit rule with the fee owner a defendant. Compensation should not be affected to any extent by the joinder or nonjoinder of the fee owner.

Property taken is worth what it will sell for in a fair market sale. If Almota's property would sell for $274,625 nothing less is just compensation.

ARGUMENT

Where a market value exists the cases are substantially unanimous in holding that fair market value at the time of taking is the just compensation required by the Fifth Amendment. (United States v. Miller, 317 U.S. 369; United States v. Petty Motor Company, 327 U.S. 372; Olson v. United States, 292 U.S. 246; Brooks-Scanlon Corp. v. United States, 265 U.S. 106).

Fair market value is also required by statute, 84 Stat. 1821, 33 U.S. C.A. 595a, (quoted herein at p. 2).

The stipulation (App. 27-30) of the parties rests upon fair market value. Whether just compensation is here the fair market value is not an issue. The elements of value and uses of the property entitled to consideration in determining that value are in dispute.

The parties stipulated (App. 29) that the fair market value of the property is $130,000 if valued in the manner urged by the Government and the sum of $274,625 (App. 29-30) if determined according to the contentions of Almota. Paragraph 12 states "in the event * * * just compensation * * * should be arrived at in accor-

dance with the contentions of plaintiff * * * the fair market value of the interest of * * * Almota * * * in the land and improvements * * * is the sum of $130,000 * * * * ". Paragraph 13 in identical language states "in the event * * * just compensation * * * should be arrived at in accordance with the contentions of defendant * * * the fair market value of the interest of * * * Almota * * * in the land and improvements * * * is the sum of $274,625 * * * * ".

No dispute exists as to the property valued. In each instance, it is "the interest of * * * Almota * * * in the land and improvements". The contention that the District Court in accepting the $274,625 valuation was somehow valuing property which Almota did not own and had no legal right to is consequently a myth. The higher amount does not purport to include the valuation of any legal property right not included in the $130,000 valuation. The pre-trial order discloses that Almota's interest in "the land and improvements" consisted of a lease (App. 11-12) of the bare unimproved land for a twenty year term expiring October 12, 1974, plus the full ownership (App. 13) of the building improvements, machinery, and equipment

thereon with a right of removal. Paragraph 9 of the admitted facts (App. 12) sets forth that the buildings consisted of 3 wood crib elevators of the capacities of 126,485, 125,290, and 122,265 bu. plus a concrete tank of 148,460 bu. capacity and a wooden flathouse also used for grain and other storage.

The difference between the two valuations does not arise from any difference in the legal property rights valued. It arises from the elimination in the lower value of consideration of some reasonably probable uses to which the property might be put at the end of the lease term which constitute very substantial elements of value inhering to the property. Eliminated is all consideration of the reasonable probability of continuing the use of the buildings in place upon the leased premises.

Under the theory of the Government, as adopted by the Circuit Court, at the end of the lease term the only uses of the property considered was their use for removal or salvage purposes. The effect is to restrict the value solely to salvage as there would seem to be no reasonable possibility of economically moving

the physical structures to a new location even if a suitable site was found. Thus at the end of the term continued use in place is the highest and best use. The $144,625 difference in the two valuations clearly points that out.

As to the uses to which the buildings might reasonably be put at the end of the term it was stipulated (App. 25) that there was available evidence " * * * that railroads generally have not cancelled or refused to renew elevator or warehouse leases so long as the lessee remains in business and is producing freight traffic for the railroad." Almota obtained numerous consecutive lease renewals since the commencement of its tenancy in 1919 (App. 6). Both by case law[1] and by statute (84 Stat. 1821, quoted herein at p. 2) all probable uses to which the property might reasonably be put must be considered in determining fair market value.

(1) United States v. Benning, 330 F.2d 527 (C.A. 6); United States v. 10,291.83 acres of land, etc., 411 F.2d 108 (C.A. 6); McCandess v. United States, 298 U.S. 342; Olson v. United States, 292 U.S. 246.

It appears that use of the improvements in place at the end of the term is a reasonably probable use to which the property could then be put and which should be considered to whatever extent it may affect the market value (App. 25). The difference in the two stipulated values indicates that the market considered such a use to be almost a certainty. The lack of an absolute right to continued use in place is no justification for disregarding that reasonably probable use where the Government had no legal right to prevent it. If only elements of value constituting legal rights are entitled to consideration then removal value should have also been eliminated as there is nothing in the record or in the facts to the effect that Almota had any legal right to any site to which the buildings could have been moved.

In addition to the statute already quoted (p. 2) numerous cases exist to the effect that all uses to which the property may reasonably be put, all elements of value, and all matters which would be considered by prudent buyers and sellers in the market must be considered.

> "In compensation cases, the market value of the property is to be fixed with consideration of ALL its available uses." (Phillips v. United

States, supra, 243 F. 2d 1, 9th Cir.)

" * * * the market value of the property is to be fixed with due consideration of all its available uses." (United States v. Miller, 317 U.S. 369).

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as any sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what it is worth from its availability for valuable uses." (Boom Co. v. Patterson, 98 U.S. 403).

" * * * the highest and best use of the property can be based upon reasonable future probability * * *. All considerations that might fairly be brought forward and given substantial weight in bargaining between an owner willing to sell and a purchaser desiring to buy should be considered and taken into account." (United States v. 10,291.83 acres of land, etc., 411 F. 2d 1081, 6th Cir.)

"But the Commission, in determining market value, was not confined to consideration of present use. As we suggested in our earlier opinion as it has been quoted here, highest and best use of the land can be based upon reasonable future probability." (United States v. Benning, 330 F. 2d 527, 6th Cir.)

" * * * the market value must be estimated. In respect of each item of property that value may be deemed to be the sum which, considering all the circumstances, could have been obtained for it; that is, the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy. In making that estimate there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining. Brooks-Scanlon Corp. v. United States, 265 U.S. 106." (Olson v. United States, 292 U.S. 246).

It would be naive to assume that in the fixing of both the $130,000 and the $274,625 valuations by the stipulation of the parties that they refrained from considering numerous elements of value not rising to the status of legal rights such as prospective competition, expectations of favorable road conditions and freight rates, the continued raising of grain and peas by farmers of the area, the extent to which farmers may build their own farm storage, etc. Almota owned no legal right to the favorable continued existence of any of those matters, each of which would have some effect upon the market value. For example, the record contains nothing to the effect that Almota owned any farmland, grain, or peas or legal right to assure the continued delivery of such products for

handling and storage. By the agreed provisions of the pre-trial order that was the highest and best use (App. 13).

Carrying the argument of the Government to its ultimate extreme, the leasehold and the improvements should have been determined to be virtually worthless on the date of taking as no legal right was owned by Almota which would guarantee a single pound of wheat or peas being delivered. A change in economic conditions over which Almota had no legal right of control could produce just such a result. Highly improbable! So is the nonrenewal of the lease in question and the termination of the continued use of the property in place. The Government has considered the reasonably probable continued demand for the use of the property for handling and storage without there being any legal right to assure such continued demand, but it would deny consideration of the reasonably probable continued use of the facilities in place because there is no legal right to a lease renewal, thereby disregarding the quoted cases and statute requiring the consideration of all reasonably probable uses and elements affecting the market value.

In the valuation of property courts are constantly giving consideration to elements affecting market value which do not constitute legal property rights, such as views, the proximity and location of highways, schools, shopping areas, parks, the availability of transportation facilities, etc. No property is valued strictly without any consideration of many matters over which the property owner has no legal control. Ownership of the most valuable building in Washington, D.C. would not be worth a wooden nickel if no one lived within a thousand miles and there was no reasonable prospect of anyone moving there. Yet, the legal rights would be the same. One must have a legal property right in what is taken to be entitled to compensation. But, once having that, all elements of value which inhere in and affect its value need not be legally enforceable rights so long as they are reasonably probable and are valued by the market. In the leasehold improvements Almota owned a property right which did not end with the term of the lease. In that property the lease renewal expectancy was an inherent element affecting their fair market value and entitled to consideration. To the extent that it actually does so, its failure

to rise to the status of a legal property right is immaterial.

The Jaramillo (1) and Fuller cases so hold, United States v. Jaramillo, 190 F. 2d 300 (C.A. 10); United States v. Fuller, 442 F.2d 504 (C.A. 9), hearing on Certiorari pending. In both of those cases the availability and accessibility of Taylor Grazing Act permit lands was allowed to be considered as an element of value in fixing just compensation for other land being taken, even though there

---

(1) That case states:

"In determining the adaptability of the lands as a ranch, it was therefore proper to take into consideration the availability and accessibility of the permit land as an appurtenant element of value for ranching purposes, provided that consideration is also given to the possibility that the permits could be withdrawn or cancelled by the Government at any time without constitutional obligation to pay compensation therefor. To this extent, this case is distinguishable on facts from the Cox and Beasley cases where the grazing permits were revoked coincidental with the taking of the fee.

Like schools, roads, markets, water and other appurtenant elements of value it was proper to take the available and accessible permit lands into consideration in arriving at just compensation for the fee lands taken * * *".

was no legal compensable property right in the permit lands nor any legal right to assure their continued use. Numerous cases had previously held that Taylor Grazing Act permits do not constitute compensable property rights, Osborne v. United States, 145 F. 2d 892 (C.A. 9); U.S. v. Cox (C.A. 10).

The Second Circuit Court of Appeals has by a number of cases adopted the rule that in the taking of a tenant's fixtures just compensation is their fair market value for use in place. No reason appears or is urged that that same rule is not equally applicable to Almota's elevator facilities. Yet, the Ninth Circuit Court has expressly declined to follow that rule in its decision below although admitting that the rule does support Almota's position (App. 44).

The recent Second Circuit case of the United States v. 1,132.5 acres of land, etc. Upper Allegheny Sand & Gravel Co. 411 F.2d 356, states at page 358:

> "It is well settled in this circuit that a tenant who has installed fixtures in property condemned by the United States need not content himself with their salvage value when the government has made their con-

tinued use in place impossible. See United States vs. Certain Property, etc. (Il Progresso) 306 F.2d 439, 448 (2d Cir. 1962). See also United States v. Certain Property, etc. (Lafayette Nut Product), 344 F.2d 142, 146 (2d Cir. 1965); United States v. Certain Property, etc. (193 Realty Corp.), 388 F.2d 596, 600 (2d Cir. 1968) (en banc). Because these fixtures diminish in value upon removal, a measure of damages less than their fair market value for use in place would constitute a substantial taking without just compensation. '[I]t is intolerable that the state, after condemning a factory or warehouse, should surrender to the owner a stock of secondhand machinery and in so doing discharge the full measure of its duty.' Jackson v. State, 213 N.Y. 34, 35, 106 N.E. 758 (1914) (Cardozo, J.)"

The reasoning in support of the rule is set forth in the Borough of Manhattan case, 388 F. 2d 596, which was relied upon by the District Court in quoting the following:

"We are unable to follow the panel majority in assuming that tenants under short-term leases will generally not be able to derive any value from their fixtures beyond the expiration of their leases. The contrary is proved not only by common experience but by the record of frequent lease renewals in this very case. Lessors do desire, after all, to keep their property leased, and an existing tenant usually has the

inside track to a renewal for all kinds of reasons - - avoidance of costly alterations, saving of brokerage commissions, perhaps even ordinary decency on the part of landlords, thus even when the lease has expired condemnation will often force the tenant to remove or abandon the fixtures long before he would otherwise have had to, as well as deprive him of the opportunity to deal with the landlord or a new tenant - - the only two people for whom the fixtures would have a value unaffected by the heavy costs of disassembly and reassembly. The condemnor is not entitled to the benefit of assumptions, contrary to common experience, that the fixtures would be removed at the expiration of the stated term."

In United States vs. Seagren, 50 F. 2d 333, Wash. D.C. cir., full compensation appears to have been awarded to a tenant for his building improvements in spite of the fact that the landlord was then contending that the lease had expired. Included was a gasoline filling station, a work shop, storage tanks, concrete paving, and an iron fence. No compensation was awarded for the leasehold itself. The obvious answer is that the tenant owned improvements were not valued as a part of the leasehold. The award was in addition to the leasehold at their

apparent market value in place.

It should be observed that the valuation rule urged by Almota and adopted by the District Court is more favorable to the government than the above stated rule in that the above rule appears to require an in place value regardless of the probabilities of the renewal or nonrenewal of the lease whereas the rule as applied by the District Court allows the market to weigh that probability or lack of probability. The Court stated:

> "So, I will hold the appraisers in this case are entitled and should be required to value the property as it existed at the time of taking, and the interests of the Almota Company must be valued at what it could be sold for on the open market, taking everything into consideration including the possibility of renewal value of the property in place, and the prospects, if they find prospects, of having the landlord require that the buildings be removed from the property. All of these elements as they find them affecting the Almota Company and the property as of the date of taking."

The opinion of the Circuit Court involved in this hearing sets forth an assumed sale of the Almota property to "A" (App. to Pet. 35). In the Court's assumed transaction it is noteworthy that

"A" has rather thoroughly investigated all elements of value and consulted with a title attorney who warned him there was no legal right to a renewal of the lease. By other investigation he satisfied himself that there was, nevertheless, great probability of a renewal. Considering everything, including the risks involved, "A" as a willing buyer and not having to buy concluded that the lease plus the improvements owned by Almota were well worth $274,625 and so he made that offer. With Almota not having to sell and accepting the offer upon deciding that it was a fair price, why is the assumed transaction not a fair market sale?

The assumed facts meet all requirements of a fair market sale of the lease and the improvements thereon actually owned by Almota (Olson v. United States, supra, 292 U.S. 246). "A" has not offered Almota $274,625 for its lease and improvements plus a bill of sale to a renewal expectancy. "A's" offer is presumably only for an assignment of the lease and a bill of sale to the building improvements, machinery and equipment situated on the leasehold. "A" gets exactly what he bargained for and Almota has sold

no more than it has. Both are informed fully as to all elements of value. Both are presumably prudent and have acted freely and willingly. Yet, the Circuit Court proceeds on the assumption that somehow Almota is getting paid for something it did not own.

The Government has stipulated (App. 29-30) that the lease with Almota's improvements had a fair market value of $274,625 considering all elements affecting value. No property not actually owned is included. The probability of a renewal of the lease makes the continued use of the improvements in place a use to which they may reasonably be put at the end of the term of the lease. Thus that probability is an element of value to be considered.

It bothers the Circuit Court that the renewal possibilities are to some extent uncertain. But the cases do not eliminate even speculative values which inhere in the property taken where the market in fact values them. The Ninth Circuit itself has so held in Cal-Bay Corporation v. United States, 169 F.2d 15, involving an oil and gas lease. That case is approved in Phillips v. United

States, 243 F.2d 1, 9th Cir., which states:

> "3. The 'Element of Speculation' in Mineral Right Does Not Preclude Their Having an Ascertainable Market Value."
> * * * * *
> "We hold that in the instant case the market value of the property should have been fixed with consideration to all its available uses, including the mineral rights; that, despite the 'element of speculation' involved in mineral rights; such rights have an ascertainable market value; and that the lower Court's rejection of the proffers of evidence relating to mineral rights tainted the results in all the four consolidated cases."

Property may be either under or over valued upon the market. Fortunes have been made and lost by people who knew or merely thought that they knew the true value of property. Yet, fair market value is the measure of just compensation. So long as it remains so it is not for the Courts to second guess the market. Whether too high or too low it constitutes the pecuniary value of that which is taken. The owner must receive its equivalent to be placed in the same financial position as before the taking (Miller & Olson cases, supra, 292 U.S. 246 & 317 U.S. 369).

The Petty case, 327 U.S. 372, cited

in the opinion is of no importance in determining the value of the improvements taken from Almota. It deals only with the taking of a leasehold involving no tenant owned buildings. No compensable property rights remained at the end of the term to be valued.

The Emery Case, 59 N.E.763, cited in the Circuit Court opinion, is another case in which no building improvements or fixtures were involved in the taking. There the landlord owned the wharf. The tenant kept and removed his fixtures. No tenant owned property was taken involving any continued ownership by the lessee after the termination of the lease.

The argument in the Almota Case is not as to property interests which ended with the term of the lease. It is as to property the ownership of which is to continue after its expiration. The Circuit Court below failed to appreciate that distinction between the strictly leasehold interests which expire with the term and the "fee" ownership of the improvements which does not. No other logical conclusion can be drawn from the Court's statement in the opinion that the valuation

issue is no different because there are tenant owned buildings than if there were none. (App. to Pet. 42).

The Osborne case, 145 F.2d 892, and like cases referred to in the Circuit Court opinion (App. to Pet. 43) involve federal grazing permits. They are now superceded by Fuller and Jaramillo, supra.

With regard to the Scully case, 409 F.2d 1061 (C.A. 10), it should be observed that the case was one of the application of the unit rule in which the value of the whole had been fixed and the Government was no longer a party. The pie had already been baked and the case only involved its division. To cut a larger piece for the tenant meant a smaller piece for the landlord. The renewal expectancy fell short of a legally enforceable right against the landlord who could always preserve the value of his fee by refusing to renew the lease. The United States in the taking here is not in the position of the Scully landlord as the fee was owned by the railroad on the date of taking (App. 11).

Although the Circuit Court relies heavily upon Scully it ignores that case

and many others by not applying the unit rule, including its decisions in Burkhart v. U.S., 227 F.2d 659; U.S. v. Block, 160 F.2d 604; Nicholson v. Weaver, 194 F.2d 804; and U.S. v. Adamant, 197 F.2d 1.

Why should it be ignored here? Had the action been brought against the fee owner and Almota the Court could under no circumstances, have arrived at a valuation of only $130,000 (see the footnote at page 8). Certainly the stipulated value of $274,625 cannot here exceed the value of the fee and improvements.

The unimproved 3/4 acre of fee land, subject to the lease cannot possibly be worth in excess of $144,625. The $114.20 per year rent points to the fact that the fee was of relatively small value. Under the unit rule in an action against both the fee owner and Almota the award would be not less than the $274,625. Being the same identical property it cannot be less in an action against Almota alone. Here, by reason of the non-joinder of the fee owner and the failure to apply the unit rule well recognized by the Ninth Circuit and by the Scully case, supra, 409 F.2d 1061, the Court is restricting

the just compensation to less than one-half of that which would otherwise result.

Regardless of the reasoning of the Circuit Court in its decision below the obvious result is to reduce the award of just compensation by $144,625 less than those same legal interests would have sold for in a fair market sale. The Court's ruling fails to place Almota in the same pecuniary position it was in when the property was taken in violation of the rule of the Miller and Olson cases, supra, 292 U.S. 246 and 317 U.S. 369. The award of $130,000 for property which admittedly could have been sold for $274,625 will not place Almota in the same pecuniary position as if its property had not been taken.

$130,000 cannot under any circumstances be the fair market value of or just compensation for the very same identical property which admittedly could have been sold in a fair market sale for $274,625. The result is a real shell game in which Almota now comes up with $130,000 for the very same property it could have received $274,625 for immediately prior to the taking and it is told the award is the equivalent of those same property rights and is the pecuniary equivalent of what it previously owned. It is further told that

the lease expectancy is not a compensable property right and that the probability of the renewal of the lease is too speculative to be valued as an inherent element of the property taken. But Almota never claimed the ownership of a leasehold expectancy. Its only claim was that the probability of a renewal was an element adding great value upon the market to the property it did own. Obviously, the market does not consider it too speculative for valuation as the agreed difference between the two values is $144,625.

Moreover, the compensation awarded by the Circuit Court below is far less than the award which would have been made in a condemnation action brought against the owner as well as Almota. Under the well recognized unit rule, hereinbefore discussed, the property is valued as a whole. The value of the fee is the just compensation to be awarded to it and the amount by which the tenant owned improvements have enhanced its value is the amount to be awarded to the tenant. As remarked by the District Court in the hearing upon Almota's motion for determination of the law of the case (App. 4) had the fee owner been joined in the action the award to Almota would have been vastly greater than

that contended for by the Government.

That amount of just compensation does not depend to any extent upon the joinder or nonjoinder of the fee owner. Yet, carried to the extreme, the contention of the Government in an action against the tenant alone where the taking coincides with the end of the term of the lease would result in no compensation whatsoever for tenant owned improvements where due to the physical nature of the property it could neither be moved or salvaged, such as a water well. The improvements would there be acquired for nothing as under the Government's theory the tenant would be entitled to no compensation as he would have no legal right to continue to use the property upon the premises and it would have no salvage value. On the other hand, the fee owner could not collect as he is not their owner. In this case there has been no contention whatsoever that the award to Almota of the full amount contended for by it would in any way result in the Government having to pay more than the true value of the property yet the application of the Circuit Court rule results in great pecuniary loss to Almota.

Consequently, and regardless of all citations of authority and the reasoning of the Government and of the Circuit Court the award as made is not "just". If it is not just then it is contrary to the Constitution. Ultimately all that need be considered in this case is the Fifth Amendment itself which requires that "just" compensation must be paid for all property taken. If the amount awarded is in fact not "just" then the taking is necessarily unlawful and in violation of the constitutional rights of the owner. If Almota's interests in the property could have been liquidated upon the market for $274,625 nothing less can be just compensation.

CONCLUSION

That the judgment of the Ninth Circuit Court of Appeals filed and entered on Sept. 23, 1970, in accordance with its opinion of the same date, 450 F.2d 125 (App. A to pet. 32), should be reversed and the judgment of the District Court (App. 51) should be reinstated to award Almota just compensation of $274,625.

Lawrence Earl Hickman
Philip H. Faris
Attorneys For Petitioner
E. 116 Spring Street
Colfax, Washington